2004 BNH 014 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 03-10751-MWV
Chapter 7

Barry J. Dyke,
Debtor

Kathy D'Abre,
Plaintiff

v. Adv. No. 03-1327-MWV

Barry J. Dyke,
Defendant

Edmond J. Ford, Esq.
FORD & WEAVER, P.A.
Attorney for Plaintiff

A.J. Connell, Esq.
Attorney for Debtor/Defendant

MEMORANDUM OPINION

The Court has before it Barry J. Dyke's ("Defendant") Motion for Reconsideration filed on May 3, 2004. Kathy D'Abre ("Plaintiff") objected to the Motion for Reconsideration on May 6, 2004. For the reasons stated below, the Court denies the Defendant's Motion for Reconsideration.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

Procedural History

On June 4, 2003, the Plaintiff filed a complaint against the Defendant objecting to the dischargeability of certain obligations arising under the decree of divorce, pursuant to section 523(a)(5) and 523(a)(15) of the Bankruptcy Code.[1] The Plaintiff argues that payment of alimony and child support is nondischargeable pursuant to § 523(a)(5) and that the Defendant's obligation to indemnify, defend, and save the Plaintiff harmless from the deficiency obligation owing to Fleet Bank and from the Chase Credit Card obligation is nondischargeable pursuant to § 523(a)(15). The Defendant answered to the complaint on September 16, 2003, denying the Plaintiff's allegations. Prior to the trial, the parties agreed that the alimony and child support obligations are excepted from discharge pursuant to § 523(a)(5). The Court held a one-day trial concerning the remaining complaint on April 13, 2004. On April 22, 2004, the Court issued its Memorandum Opinion, finding that the Defendant has the ability to indemnify the Plaintiff against the deficiency debt and the Defendant's business debt and that the benefit of a discharge of the Defendant's obligation would not outweigh the detrimental consequences to the Plaintiff.

On May 3, 2004, the Plaintiff filed a Motion for Reconsideration, requesting that the Court reconsider its April 22, 2004, order entering judgment in favor of the Plaintiff. In the motion, the Plaintiff stated that the Defendant's expenses would exceed his income and that the benefit of a discharge of the Defendant' obligation would outweigh any hardship to the Plaintiff. On May 6, 2004, the Plaintiff filed her Objection to Motion for Reconsideration.

DISCUSSION

The federal courts have treated a motion for reconsideration as either a motion to alter or amend pursuant to FED. R. CIV. P. 59(e) or as a motion for relief from judgment or order pursuant to FED. R. CIV. P. 60(b). See In re Wedgestone Financial, 152 B.R. 786, 788 (Bankr. D.Mass. 1993). Although the

[1] Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform act of 1978, as amended, 11 U.S.C. §§ 101, *et seq*.

Defendant did not label this motion for reconsideration as a motion under Rule 59(e), "regardless of how it is characterized, a post-judgment motion made within ten days of the entry of judgment that questions the correctness of a judgment is properly construed as a motion to alter or amend judgment under FED. R. CIV. P. 59(e)." Aybar v. Crispin-Reyes, 118 F.3d 10, 14 (1st Cir. 1997) (citing Skagerberg v. State of Okla., 797 F.2d 881, 883 (10th Cir. 1986). Because the Defendant's motion was filed within ten days of the rendition of the judgment, the Court construes this motion as a motion under Rule 59(e). See In re Shepherds Hill Development Co., LLC, 263 B.R. 673, 681 (Bankr. D.N.H. 2001), *rev'd on other grounds*, Balzotti, v. RAD Investments, 273 B.R. 327 (D.N.H. 2002).

Motions for reconsideration under Rule 59(e) are entertained by courts if they seek to correct manifest errors or law of facts, present newly discovered evidence, or when there is an intervening change in the law. See Jorge Rivera Surillo & Co. v. Falconer Glass Indus., Inc., 37 F.3d 25, 29 (1st Cir. 1994) (citing F.D.I. Corp. v. World University, Inc., 978 F.2d 10, 16 (1st Cir. 1992)); National Metal Finishing Com. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 124 (1st Cir. 1990). They may not be used to relitigate old matters, or to raise a new legal theory, or present evidence that could have been raise prior to the entry of judgment. 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCURE: CIVIL § 2810.1 (2d ed. 1995).

The Defendant's Motion for Reconsideration reiterates many of the facts presented at the April 13, 2004, trial, such as the work hours of the Plaintiff, and the ages of the three children, etc. The Court was well aware of those facts when it rendered the judgment. As the Court stated in its Memorandum Opinion, these facts, without more, are not sufficient to demonstrate that the benefit of a discharge to the Defendant would outweigh any hardship to the Plaintiff. See National Metal Finishing Com., 899 F.2d at 119 ("Motions for reconsideration may not be used by the losing party to repeat old arguments previously considered and rejected.").

Moreover, the Defendant's Motion for Reconsideration did not present any newly discovered evidence. The Defendant alleges that his Schedule J failed to note some of the increased expenses. The Defendant does not state that this information was discovered between the trial and the time when the motion was filed. If the Defendant wished the Court to consider this information, he should have brought this information to the Court's attention at the trial. Finally, the Defendant does not allege any manifest error of law or any intervening change in the law.

CONCLUSION

As the Defendant has failed to present newly discovered evidence and has failed to establish that the Court made a manifest error of law or fact in rendering its previous decision in this matter, the Defendant's Motion is hereby DENIED.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DONE AND ORDERED this 13th day of May, 2004, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge